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**BEFORE THE HYDRAULIC APPEALS BOARD
STATE OF WASHINGTON**

BEVERLY CECCANTI and MARGHERIT
CECCANTI

Appellants,

v.

WASHINGTON STATE DEPARTMENT
OF FISH AND WILDLIFE

and

SUSAN HAMNER,

Respondents.

HAB NO. 06-001

ORDER GRANTING SUMMARY
JUDGMENT TO WASHINGTON STATE
DEPARTMENT OF FISH AND
WILDLIFE

13 This matter comes before the Hydraulic Appeals Board (Board) on the Washington
14 Department of Fish and Wildlife's (WDFW) motion for summary judgment. In ruling on this
15 motion, the Board has considered the following submittals:

- 16 1. Petition for Review with attachments;
17 2. WDFW's Motion for Summary Judgment with attached exhibits 1 through 20;
18 3. Ceccanti's Response to WDFW's Motion for Summary Judgment with
19 attachments;
20 4. WDFW's reply, and
21 5. Declaration of Correction.

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(1)

1 Having fully reviewed the record in the case, the Board makes the following ruling.

2 Factual Background

3 Ms. Susan Hamner (Hamner) is the owner of a waterfront residence on Day Island in the
4 City of University Place. The appellants, Beverly and Margherit Ceccanti (Ceccantis) own a
5 vacant lot immediately adjacent to the Hamner residence. Day Island is a narrow strip of land of
6 low elevation, bordered on the west by Puget Sound, and on the east by an intertidal lagoon. The
7 Hamner and Ceccanti properties are located on the east side of the island. *Exs. 1-5.*

8 Sometime in 2002, Hamner constructed a concrete bag bulkhead on the interdunal side of
9 the property to protect her property from erosion due to floodwater. Construction of the
10 bulkhead required placement of fill in the lagoon. Hamner also added a pier on top of the
11 bulkhead. This project was done without a hydraulics project approval (HPA). *Exs. 4, 5.*

12 A site investigation was conducted by WDFW in April of 2004. Based on this visit,
13 WDFW concluded that the unpermitted project resulted in loss of aquatic vegetation and juvenile
14 salmonid migration corridors, rearing and feeding areas, and intertidal wetland vascular plants.
15 WDFW issued a written warning to Hamner, and required her to perform corrective action. On
16 January 11, 2006, Hamner submitted an HPA application proposing to modify a portion of the
17 existing bulkhead by pulling it back from the toe of the slope and replacing the concrete bag
18 blocks with larger rocks. In addition, Hamner proposed to establish native vegetation landward
19 of the replacement bulkhead. *Exs. 4, 5, 6, 8.*

20 The application was reviewed pursuant to the State Environmental Policy Act (SEPA)
21 and on January 26, 2006, University Place issued a mitigated determination of nonsignificance

1 (MDNS) for the proposed project. On February 23, 2006, following the completion of the
2 fourteen day comment period on the MDNS, WDFW issued HPA Log No. 104146-2. *Exs. 9, 10.*

3 HPA Log No. 104146-2 authorized Hamner to “remove un-permitted portions of existing
4 concrete bag bulkhead and replace with rock bulkhead, including vegetative planting buffer.”
5 Condition 7 authorized the removal and replacement of the existing concrete bag bulkhead from
6 all shoreline sections except for the southern-most end of the property. Condition 16 clarified
7 that the existing pier could be removed to assist in shoreline modifications, but should be re-
8 aligned in original position with a 2-foot wide grated metal decking strip running the entire
9 length of the pier. Hamner did not request, and WDFW did not authorize, removal or
10 replacement of the southern bulkhead. *Ex. 10, 11, 12.*

11 On February 28, 2006, five days after HPA Log No. 104146-2 was issued, WDFW had a
12 pre-construction meeting on site with Hamner. Specific locations for the placement of the
13 replacement bulkhead were measured and staked. Around March 1, 2006, Hamner completed
14 the bulkhead work authorized by HPA Log No. 104146-2. On March 20, 2006, WDFW issued
15 HPA Log. No. 104146-3. HPA Log No. 104146-3 was intended to “better reflect what was
16 finally agreed to and implemented, based on site conditions” and to be used for future
17 compliance inspections. It was identical to HPA Log No. 104146-2, except it included the
18 specific measurements taken on site during the pre-construction meeting (condition 6); clarified
19 in condition 7 that Hamner could keep her fence, provided the adjacent topsoil was removed; and
20 added an additional species of native vegetation that could be used (condition no. 9(h)). *Exs. 12,*
21 *14, 15.*

1 The Ceccantis filed an appeal with this Board on April 14, 2006. At a pre-hearing
2 conference conducted by the Board's presiding officer, the parties identified the following
3 issues:

- 4 1. Is the Appeal of HPA Log No. 104146-3 moot, where all of the work authorized
5 under the HPA has been completed, and this tribunal does not have the authority
6 to provide the relief that Appellants are seeking?
- 7 2. Can the Appellants meet their burden of showing that HPA Log. No. 104146-3
8 should have been denied under chapter 77.55 RCW, where the HPA authorized
9 the permittee to undertake measures to correct and mitigate impacts from prior,
10 unpermitted work?
- 11 3. Is the Appeal of HPA Log No. 104146-3 timely?
- 12 4. Was HPA Log No. 104146-3 issued in violation of RCW 77.55.021 and RCW
13 77.55.141?
- 14 5. Was the mitigated determination of nonsignificance appropriate?
- 15 6. Did WDFW violate RCW 77.04.012 when it approved HPA Log No. 104146-3?
- 16 7. Did WDFW's approval of HPA Log No. 104146-3 violate property rights
17 guaranteed in the state and federal constitution and/or RCW 77.44.012?

18 WDFW filed a motion and requested dismissal of this appeal on the basis that that the
19 appeal is moot, and that it is untimely.¹ The Board concludes that it does not have the authority
20 to grant the relief the Cecantis are seeking, and dismisses the appeal on that basis.

21 Analysis

22 A. Summary Judgment

23 Summary judgment is a procedure available to avoid unnecessary trials where formal
24 issues cannot be factually supported and cannot lead to, or result in, a favorable outcome to the
25

¹ WDFW also requested that if the Board does not grant complete dismissal, the Board should dismiss issues five, six and seven. Because the Board does grant full dismissal, the Board does not address these other issues.

opposing party. *Jacobsen v. State*, 89 Wn. 2d 104, 108, 569 P.2d 1152 (1977). The summary judgment procedure is designed to eliminate trial if only questions of law remain for resolution.

The party moving for summary judgment must show there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Magula v. Benton Franklin Title Co., Inc.*, 131 Wn. 2d 171, 182, 930 P. 2d 307 (1997). Thereafter, the nonmoving party must set forth specific facts evidencing a genuine issue of material fact. *Id.* Since the motion to dismiss in this case includes factual attachments, it is properly considered as a motion for summary judgment. *Mueller v. Miller*, 82 Wn.App. 236, 246, 917 P.2d 604 (1996). This case is appropriate for summary judgment because there are no disputed facts material to the legal issue of Board jurisdiction.

B. Timeliness and Scope of Appeal

WDFW makes two arguments for complete dismissal of this appeal. One argument is that the Ceccantis' appeal is timely only as to HPA No. 104146-3. Therefore, WDFW argues, the only issues the Board has jurisdiction over pertain to the minor changes made to the HPA between its prior issuance (HPA No. 104146-2) and the current version (HPA No. 104146-3). Since none of the issues identified in the appeal pertain to these modifications, WDFW contends the appeal should be dismissed.

In support of this argument, WDFW cites to case law in Washington addressing the situation of repeated applications for the same or similar project by the project applicant. See *DeTray v. City of Olympia*, 121 Wn.App. 777, 90 P.3d 1116 (2004); *Hilltop Terrace Homeowner's Ass'n v. Island County*, 126 Wn.2d 22, 891 P.2d 29 (1995). In these cases, the

1 applicant, after unsuccessfully challenging either denials or conditions on an application, made a
2 second application for the same or similar project. The Court invokes the doctrine of res judicata
3 in these situations to prevent “repetitious litigation and provide binding answers.” *DeTray* at
4 785. The facts giving rise to these cases are different from the case at hand where the repeated
5 issuance of the HPAs appears to have been initiated by WDFW, as opposed to the applicant, and
6 seems to have been primarily for the purpose of documenting clarifications to the permit for
7 future enforcement purposes.² *See Exhibit 14.*

8 The Board is not convinced by WDFW’s argument that the Ceccantis are precluded from
9 challenging all aspects of HPA No. 104146-3. Where WDFW issues a HPA, which on its face
10 makes no reference back to prior HPAs and does not state it is a “revision” or an “amendment,”
11 an appellant that files a timely appeal of that HPA should not be precluded from challenging the
12 HPA in its entirety. As the Ceccantis state:

13 It [HPA No. 1-4146-3] is not identifiable as an addendum in any way that would be
14 recognizable by a reasonable person without specific knowledge of the agency or its
procedures.”

15 *Ceccanti’s response, p. 10.*

16 However, even if the Ceccantis are allowed to challenge all aspects of HPA No. 104146-
17 3, their appeal still fails as a matter of law. WDFW’s second argument is well taken. There is
18 no relief the Board can provide to the Ceccantis’ through this appeal.

20
21 ² The Board questions the practice of using repeated issuances of HPAs merely to clarify minor aspects of the
project. This practice seems unnecessarily confusing for potential appellants, especially if WDFW contends the
whole HPA is not subject to review if appealed.

1 C. Board Jurisdiction

2 The relief the Ceccantis are seeking is the removal of the southern wall of the
3 unpermitted bulkhead. This removal work was not applied for or authorized by HPA No.
4 104146-3. The Hydraulic Appeals Board is an administrative body and has only those powers
5 specifically granted by statute. *Skagit Surveyors and Engineers v. Friends of Skagit County*, 135
6 Wn. 2d 542, 558, 958 P. 2d 962, 970 (1998). The Board's statutory authority to review
7 WDFW's decision on hydraulic project approvals for marine bulkheads is found in RCW
8 77.55.141(4). This provision provides the Board the authority to review WDFW's "approval,
9 denial, conditioning, or modification of a permit." It does not provide the Board with authority
10 to consider a project that is not applied for by the applicant, or approved by WDFW.

11 Here, the Ceccantis are seeking something not addressed by the HPA at all, the removal
12 of the unpermitted southern bulkhead which they believe is on their property. WDFW contends
13 it does not have the authority to require removal of the southern bulkhead.³ Even if it does it has
14 not chosen to exercise that authority here.⁴ The Board does not have jurisdiction to review

16 ³ The Ceccantis argue that there are Shoreline cases in which the Shoreline Hearings Board has required removal of
17 bulkheads. The case cited, *Blair v. Pierce County and Ecology*, SHJB 93-81 and 95-10 (1995) involves a situation
18 where Ecology chose to exercise its enforcement authority by issuing a civil penalty for construction of a bulkhead
19 without a permit. Ecology also denied an after-the-fact application for a permit submitted by Blair during the
ongoing enforcement appeal. As WDFW correctly points out, the enforcement authority of Ecology and/or the local
government under the Shoreline Management Act is different from that of WDFW in the hydraulics project approval
process. The regulations which implement the SMA expressly address Ecology and/or the local government's
authority to issue cease and desist orders and to require specific corrective action. See WAC 173-27-270. The
Ceccantis do not point to any similar source of authority for WDFW, nor does WDFW claim to have such authority.

20 ⁴ The record does not contain sufficient information to explain why the southern bulkhead was not included in the
mitigation work applied for and permitted by the agency. In a February 23, 2006 e-mail, Dave Molenaar with
WDFW explains to Susan Hamner that "The concrete bags will need to be removed. They are located at and
21 landward of the OHWL. These have never been an approved bulkhead building material and the only reason we
have allowed the concrete bags to be retained on the southern end of the project site was not [sic] provide some

WDFW's decision not to take enforcement action. That authority is left to the Superior Court.

See RCW 34.05.574(1).⁵

Because HPA No. 104146-3 does not address the southern bulkhead, there is no relief the Board can provide to the Ceccantis through this appeal.

ORDER

WDFW's Motion for Summary Judgment is granted and the appeal in this case is dismissed.

Done this 11th day of September 2006.

HYDRAULIC APPEALS BOARD

Hedia Adelsman
Department of Ecology Representative

Jane Banyard
Department of Fish & Wildlife Representative

Lee Faulconer
Department of Agriculture Representative

Kay M. Brown
Administrative Appeals Judge, Presiding

measure of economic relief to you for not having to replace them with rock. Economic interests are normally not considered on the environmental review of things (my job). I suspect that over time, these concrete bags will weather and will need to be replaced, unlike the rock that will be put in place at the location of the pier and northern shoreline area." *Ceccantis' Response, Ex. G*. In a March 30, 2006 letter, Mr. Molenaar states, in a letter to Greg Hueckle, Assistant Director of WDFW, that: "The southern-most portion of the bulkhead was left intact, as it appeared to be constructed immediately waterward of the OHWL, along the face of a steep bank." *Ex. 12*.

⁵ Another option open to the Ceccantis may be to pursue a private civil action in Superior Court.

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